No. 2824

# In the United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

M. P. FREEMAN, as Trustee of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,
*Appellant,*

vs.

JOHN H. MARTIN, as Trustee of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,
*Appellee.*

## BRIEF OF JOHN H. MARTIN
**Trustee, Etc., Appellee.**



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### STATEMENT OF THE CASE

We desire to controvert the statement of the case in some respects, as made by Counsel for Appellant in his brief, and we therefore submit the following as our statement of the case.

The property involved consists of about ten thousand tons of smelter flue dust, valuable for its copper

contents, and a slag dump of many thousand tons, situate at the town of Sasco, Pinal County, Arizona.

This action was originally instituted as a summary proceeding before the Referee in Bankruptcy at Tucson, Arizona, in the Matter of the Southern Arizona Smelting Company, a corporation, bankrupt, by John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, Bankrupt, appearing in such first named bankruptcy proceeding and claiming the flue dust and slag as a part of the assets of and as belonging to the estate of the Copper Company, both of which Bankruptcy proceedings were pending before the same Referee.

Martin, Trustee of the Copper Company based his claim to the flue dust and slag upon two grounds:

First: That the flue dust and slag were produced by smelting the ores of the Copper Company—ores which came out of the mines of the Copper Company and ores which the Copper Company purchased and paid for; that the values in the flue dust, to-wit, the mineral contents, came out of such ores so belonging to the Copper Company or purchased by it.

That the Copper Company did not sell such ores to the Smelting Company; that the Smelting Company did not purchase such ores from the Copper Company.

That there was a formal agreement between the Copper Company and the Smelting Company to the effect that the Smelting Company should only be allowed

a credit with the Copper Company for smelting said ores, of the cost per ton of such smelting, and that said agreement did not provide that the flue dust and slag should belong to the Smelting Company.

That the Smelting Company did not receive any of the proceeds of the bullion or products resulting from such smelting, but that the Copper Company received all of such proceeds and handled and disposed of the same.

Second: That the Copper Company was the parent company of the Smelting Company; that the Smelting Company was simply a subsidiary of the Copper Company; that the Copper Company created the Smelting Company as a subsidiary and auxiliary corporation for its convenience in the transaction of its business of mining and smelting, and for the purpose of smelting the ores from its mines and other ores which the Copper Company might purchase; that the Smelting Company was not an independent concern, but was simply created and used by the Copper Company as an adjunct, agent and instrumentality in its said business.

The case was before the District Court three times.

Freeman, Trustee of the Smelting Company, objected to the jurisdiction of the Referee to hear and determine the question of title and ownership of the property in the summary proceeding, which objection was overruled by the Referee, the property being in the possession of the bankruptcy court, from which ruling Freeman, trustee, appealed, by petition for review, to the District

Court. The District Court sustained the ruling of the Referee and referred the case back to the Referee with directions to take the evidence. Voluminous evidence, oral and documentary was taken before the Referee, who held that the flue dust and slag belonged to Freeman, Trustee, from which order Martin, Trustee, appealed, by petition for Review, to the District Court, taking up the entire record, including all the documentary evidence and transcript of all the oral testimony.

It was then stipulated that the case should be treated and proceeded with in the District Court, as a plenary action entitled John H. Martin, Trustee, etc., vs. M. P. Freeman, Trustee, etc., and all the evidence taken before the Referee, oral and documentary, was submitted to th District Court.

The parties agreed to findings of fact which were adopted by the Court.

The District Court thereafter rendered its conclusions of law and decree, as follows:

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**"CONCLUSIONS OF LAW**

"The Court having heretofore made and filed its Findings of Fact in the above-entitled matter, does now make its Conclusions of Law therefrom, as follows:

## "CONCLUSIONS OF LAW

That the Southern Arizona Smelting Company, a corporation, was a subsidiary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the transaction of its business; that said Imperial Copper Company was the parent corporation of said Southern Arizona Smelting Company, and used said Southern Arizona Smelting as an adjunct, agent and instrumentality in the transaction of its business.

That all of the ores shipped by the Imperial Copper Company to the Southern Arizona Smelting Company, and the title thereto, as well as the title to all of the flue dust and slag dump arising from the Smelting of said ores by the Southern Arizona Smelting Company remained in the Imperial Copper Company; that the contract under which said ores were so shipped by the Imperial Copper Company, and smelted by the Southern Arizona Smelting Company, constituted a bailment and not a sale; that said slag dump and flue dust is the property of the estate of the Imperial Copper Company, bankrupt, and John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, bankrupt, is entitled to the possession of said property; and that the estate of said Southern Arizona Smelting Company has no title or right to the said slag dump and flue dust and that said M. P. Freeman, as Trustee in Bankruptcy of said Southern Arizona Smelting Company, bankrupt, has no right, title or interest in or to

any of said property, and is not entitled to the possession thereof."

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**"DECREE**

"This cause coming on to be further heard at this term on the 14th day of June, A. D. 1916, the same having been heretofore argued by respective counsel and submitted to the Court; and the parties having heretofore stipulated and agreed in open court to the findings of fact herein, which said findings of fact the Court did adopt and file as its findings of fact herein; the plaintiff appearing by his counsel, Francis M. Hartman, Esq., and Edwin F. Jones, Esq., and the defendant appearing by his counsel, Selim M. Franklin, Esq., and the Court being now fully advised in the premises, thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

"(1) That the estate of said The Imperial Copper Company, a corporation, bankrupt, is the owner of all of that certain property mentioned and described in the petition of John H. Martin, Trustee in Bankruptcy of the Estate of The Imperial Copper Company, a corporation, bankrupt, on file herein, to-wit:

"A certain lot of flue dust, estimated to contain ten thousand (10,000) tons, more or less; and also a certain slag dump, all situated at the smelting plant of said Southern Arizona Smelting Company, a corpora-

tion, bankrupt, at the town of Sasco, Pinal County, Arizona, and that the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, is entitled to the possession of all of said flue dust and slag.

"(2) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither the estate of the said Southern Arizona Smelting Company, a corporation, bankrupt, nor the said M. P. Freeman, Trustee in Bankruptcy of the said estate of the Southern Arizona Smelting Company, a corporation, bankrupt, has any right, title or interest whatsoever in or to any of said flue dust or said slag, and that the said M. P. Freeman, as such trustee of the Southern Arizona Smelting Company, a corporation, bankrupt, is not entitled to the possession of the same.

"(3) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said M. P. Freeman, Trustee in Bankruptcy of said Southern Arizona Smelting Company, a corporation, bankrupt, be and he hereby is ordered and directed to turn over and deliver unto the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, all of said flue dust and slag, and

"(4) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, do have and recover of and from the estate of said Southern Arizona Smelt-

ing Company, a corporation, Bankrupt, and from M. P. Freeman, Trustee in Bankruptcy of said estate of said Southern Arizona Smelting Company, a corporation, bankrupt, his costs and disbursements incurred herein, amounting to the sum of Ten ($10.00) Dollars."

From this judgment and decree, M. P. Freeman, Trustee, appeals to this court.

The District Court had before it not only the findings of fact agreed upon by the parties but **all** the evidence, oral and documentary, and we insist that its conclusions and judgment were correct, and that its judgment and decree should be affirmed.

Counsel for appellant, in their brief as we understand it, discuss three legal questions, although but one is specified in their specifications of error.

(1) That the Smelting Company was not a subsidiary of the Copper Company.

(2) That the Smelting Company absolutely purchased the ores from the Copper Company.

(3) Statute of limitations.

The first question can be determined by an examination of the facts relating to the organization of the two companies, the manner in which the business was conducted, etc., and the application thereto of well known legal principles.

If the Smelting Company was merely a subsidiary,

adjunct, agent and instrumentality of the Copper Company and used as such for its convenience in the transaction of its business, then it follows that, not only the flue dust and slag, but all of the property held in the name of the Smelting Company belongs to and is the property of the Copper Company and subject to its debts.

In order to properly determine the second question it is necessary to take into consideration the relationship existing between the Copper Company and the Smelting Company, the manner in which the business was transacted, as well as the construction or interpretation of the contract referred to with reference to the smelting of the ores.

We will first endeavor to show this Honorable Court that the District Court was absolutely correct in holding that the Smelting Company was a subsidiary, etc., of the Copper Company.

The following extracts from the findings of fact, as agreed upon by the parties and adopted by the Court below, are all which we think are material to a decision of the question as to whether or not the Smelting Company was a subsidiary, instrumentality, etc., of the Copper Company.

These extracts are submitted with the hope that it will aid the court in the consideration of the matters involved.

"That the Imperial Copper Company was organized in May, 1903, by Messrs. F. M. Murphy, B. P. Cheney,

and associates, for the purpose of acquiring, owning and operating mines, mining properties and smelting plants, and for other purposes in connection therewith, and that Ben Goodrich, A. N. Gage, Henry Kingsley, E. W. Walker and John L. Miller were the incorporators, and constituted the first board of directors of said company; that Ben Goodrich was president, Henry Kingsley was vice-president and A. N. Gage was secretary and treasurer, and were the first officers of the corporation.

The Articles of Incorporation of the Imperial Copper Company amongst other things provide:

'The general nature of the business proposed to be transacted by the corporation is as follows, to-wit:

'To locate, buy, lease, hold, sell, improve, develop and operate mines and mining properties and to pledge, mortgage or otherwise deal in the same, or any leases, options or bonds thereon.

'To quarry, smelt, refine, dress, amalgamate and prepare for market and to market ores, metals and mineral substances of all kinds and to carry on any other operation which may seem conducive to any of the company's objects, to buy, sell, manufacture and deal in minerals, plants, machinery, implements, conveniences, provisions and things capable of being used in connection with mining operations or required by workmen and others employed by the corporation, to buy, construct, lease, sell, convey, maintain, improve, manage, work, control, and superintend any roads, bridges, ways, reservoirs, watercourses, wharves, tramways or rail-

roads, in so far as it may be lawful so to do, to buy, construct, lease, sell, convey, maintain, improve, manage, control and superintend furnaces, smelters, concentrators, mills, crushing works, hydraulic works, factories, warehouses and other conveniences which may seem directly or indirectly conducive to any of the objects of the corporation, and to contribute to, subsidize or otherwise aid or take part in any such operations.' " (Transcript, pp 43-44).

"That on the 6th day of August, 1906, Ben Goodrich, A. N. Gage, Henry Kingsley, J. L. Miller and W. F. Walsh, duly organized under the laws of the Territory of Arizona, the "Southern Arizona Smelting Company," a corporation, bankrupt herein, with an authorized capital stock of 1,500,000 shares. The general nature of the business proposed to be transacted by said corporation was to quarry, mine, dig, buy and otherwise acquire and deal in, sell and otherwise dispose of ores, minerals, metals, and their products direct and incidental, and to dress, mill, reduce, smelt, prepare, refine and otherwise treat ores, minerals, metals and their products, and to construct plants, buildings, machinery and appliances for the carrying on of any of said business; and to locate, buy or otherwise acquire farming lands, desert lands, and to locate and to acquire and develop towns, townsites, water rights, and also to construct, operate and sell works for the producing and furnishing of power, water, gas or electricity; and to operate tramways, street railroads and other methods of conveyance; to carry on merchandise busi-

ness; and to hold, purchase, buy and sell, mortgage and pledge, and otherwise deal in the bonds, mortgages, notes, debentures, shares of capital stock and other securities of any priviate corporation, and to do other certain business, as set forth in the Articles of Incorporation.

The management and control of the business was, by its Articles of Incorporation, vested in and to be conducted by a board of directors of not less than five persons; the above-named incorporates being named as the persons to constitute the first Board of Directors, of whom Ben Goodrich was to be president, Henry Kinsley, vice-president, and A. N. Gage, secretary and treasurer.

That at the time of the organization of said Smelting Company in the latter part of 1906, and during all of the time of the operation of the said Smelting Company as above set forth, the following named persons were directors of the Imperial Copper Company:

E. B. GAGE,

W. F. STAUNTON,

A. N. GAGE,

H. M. ROBINSON,

SELWIN EDDY,

F. M. MURPHY,

V. L. MASON.

and that the following named persons were officers of said corporation:

E. B. GAGE, President,

W. F. STAUNTON, Vice-President and General Manager.

A. N. GAGE, Secretary and Treasurer.

That during practically all of the time said smelter was in operation, to-wit, during the years of 1907, 1908, 1909, and 1910, the following named persons were the directors of said Smelting Company:

E. B. GAGE,

W. F. STAUNTON,

A. N. GAGE,

H. M. ROBINSON,

F. M. MURPHY.

and that the following named persons were the officers of said Smelting Company:

E. B. GAGE, President,

W. F. STAUNTON, Vice-President and General Manager.

A. N. GAGE, Secretary and Treasurer." (Transcript, pp 44-45-46).

"In pursuance of said contract the Imperial Copper Company did erect a smelting plant on the 640 acre

tract above-mentioned, and did convey the same to the Smelting Company, and there-after, and on the..... day of....., 1907, said Smelting Company did cause 7,995 shares of its capital stock to be issued and delivered to the Imperial Copper Company in payment therefor, in accordance with said contract.

"That at said time a total of 8,000 shares of stock were issued, of which 7,995 shares were issued to said Imperial Copper Company, and the remaining five shares had theretofore been issued to qualify the said directors, as heretofore stated, and no other shares of its capital stock at that time were issued or outstanding." (Transcript, p 51).

The contract with reference to the sale of the bullion, between the Smelting Company, American Metals Company and Imperial Copper Company was executed on behalf of the Smelting Company and the Copper Company by the same parties, to-wit, E. B. Gage as President, and A. N. Gage as Secretary of the Smelting Company, and E. B. Gage as President, and A. N. Gage as Secretary of the Copper Company. (Transcript, p 63).

"From the time the Smelting Company commenced operating its smelter in 1908, down to the time it ceased operating, in 1910, the Imperial Copper Company, shipped to it all of the ores which it extracted from its mines, being over five hundred thousand tons, and the same were smelted and reduced to bullion by the Smelting Company. The ores shipped by the Copper Company were received and smelted by the Smelting Company in

accordance with the terms of said contract between the two companies of date August 14, 1906, aforesaid, and the bullion produced by the Smelting Company was by it sold to the American Metals Company, Ltd., in accordance with the terms of the said contract between the said Smelting Company, said American Metals Company and the Imperial Copper Company, of date December 16, 1907, aforesaid." (Transcript, pp 66-67).

The proceeds of the sales (of the bullion) were eventually received by the Copper Company and were by it credited on its books to the account of the Smelting Company. (Transcript p 69).

"The Smelting Company obtained a bill of lading from the Railroad Company for each car of bullion which it so shipped to the American Metals Company, which bill of lading it endorsed and delivered to the Imperial Copper Company with the smelter assay, weight, approximate value, showing the gross value of the bullion, attached thereto; the Imperial Copper Company then drew a draft on the American Metals Company in favor of the Development Company of America for 90% of the gross value, which draft the Copper Company sent to the Development Company of America in New York; and the Copper Company then also drew a draft for like amount on the Development Company of America and deposited the same to its, said Copper Company's credit with the Phoenix National Bank in Arizona.

"The amount of the draft, covering the transaction

was credited by the Copper Company on its books to the Smelting Company, and the Smelting Company made entry on its books of the total monthly amount of such drafts as a charge against the Imperial Copper Company. After the American Metals Company rendered its Account Sales for the lot of bullion so shipped, showing the balance due from it on account of each shipment, the said balance was paid to the Imperial Copper Company in like manner as above set forth, and such balance was likewise credited by it on its books to the account of the Smelting Company and each month the Smelting Company charged the Copper Company with the amounts so received by it. (Transcript, p 71).

"The Smelting Company did not keep any bank account with any bank. The method by which it paid its bills, including labor, materials, coke, fuel and all other charges which it had to pay in the conduct of its business was as follows: It made out vouchers which were O. K.'d by its superintendent, and he sent them to the Imperial Copper Company with a request to pay them and charge the same to the account of the Southern Arizona Smelting Company. The Imperial Copper Company paid the vouchers, and charged the amount against the Smelting Company; and like entries were made on the books of the Smelting Company." (Transcript, p 72).

The payment for ore so smelted and purchased from other persons by the Smelting Company was made by

an order drawn by it upon the Imperial Copper Company and the order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company. (Transcript, p 73).

In conducting its smelting operations, the Smelting Company purchased flux, that is, iron, lime and sulphur, and this expense for flux was a part of the cost of smelting. Coke was also purchased by the Smelting Company from January, 1908, to September 30, 1910, to the value of over $500,000.

"This coke and flux was also paid for by vouchers drawn by the Smelting Company from time to time, on the Imperial Copper Company and the Imperial Copper Company paid the same and charged the amount upon its books against the Smelting Company, in its account against it; the Smelting Company also kept an account thereof on its books." (Transcript, p 73).

"The books of both companies further show that after the smelting plant of the Smelting Company was closed down, the Smelting Company continued to present vouchers for labor, material and other items of like nature, to the Imperial Copper Company, with its request that it pay the same, and that the said Imperial Copper Company did pay the same, so that on the 5th day of July, 1911, when the petition in bankruptcy was filed against the Imperial Copper Company, the Imperial Copper Company, as shown by its books, had paid out for the Smelting Company, a total of $26,-887.71 in excess of all amounts of money which it had

credited to the account of the Smelting Company, so that on said date there remained, according to said books, a balance due from the Smelting Company to the Imperial Copper Company of said sum of $26,887.71." (Transcript, pp 73-74).

"That on the 5th day of July, 1911, certain creditors of the Imperial Copper Company filed with the District Court of the First Judicial District of the Territory of Arizona their petition to have said Imperial Copper Company declared a bankrupt, and thereafter, and on the 25th day of July, said Imperial Copper Company was declared a bankrupt, and thereafter, and on the 12th day of August, 1911, M. P. Freeman was duly elected the Trustee in Bankruptcy of said Imperial Copper Company; that he qualified as such on the 26th day of August, 1911." (Transcript, p 74).

"That on the 17th day of June, 1914, the said M. P. Freeman did resign as Trustee in Bankruptcy of the said Imperial Copper Company, bankrupt, which resignation was accepted by the United States District Court for the State of Arizona, on July 1, 1914, and on said day John H. Martin, the petitioner in the present proceeding, was elected and appointed Trustee in Bankruptcy of the said Imperial Copper Company, bankrupt, to fill the vacancy caused by the resignation of said M. P. Freeman, as such, and on July 2, 1914, said John H. Martin duly qualified as such Trustee in bankruptcy of said Imperial Copper Company, and ever since has been and now is the Trustee in Bankruptcy of said Imperial

Copper Company, Bankrupt." (Transcript, pp 75-76).

That on or about July 10, 1910, some of the creditors of the Copper Company, bankrupt, served written notice on M. P. Freeman, the then trustee in bankruptcy of the bankrupt Copper Company to take possession and control of all the assets of the Smelting Company including slag, etc., as a part of the assets of the Copper Company, bankrupt. (Transcript, p 78).

That on the 20th day of September, 1911, the appraisers appointed in the matter of the Imperial Copper Company, bankrupt, appraised the said smelting plant, machinery and equipment as a part of the assets of the estate of the Copper Company, bankrupt. (Transcript, p 78).

That the appellee herein, Martin, as trustee of said Copper Company, on July 5th, 1914, immediately upon being qualified, went to said flue dust and slag and posted notices thereon stating he had taken possession thereof and placed a keeper in charge of same who remained on the ground until October 31, 1914, when Freeman was elected Trustee in Bankruptcy of the Smelting Company. (Transcript, p 79).

That the Copper Company received all the profits of the Smelting Company and was the owner of all the shares of stock of said company. (Transcript, p 79).

From these facts there was only one possible conclusion to draw upon the question as to whether or not the Smelting Company was a subsidiary and creature of the Copper Company.

With all this overwhelming evidence it was impossible for the Court to come to any other conclusion than that the Smelting Company was nothing more nor less than the creature of the Copper Company, and that the Copper Company simply created and used the Smelting Company as an instrumentality for convenience in the transaction of its business.

The District Court, after considering the findings of fact as agreed upon by the parties and also having before it all the evidence in the case, having correctly held that the Smelting Company was merely a subsidiary, adjunct, agent and instrumentality of the Copper Company, it necessarily follows, as hereinbefore stated that the flue dust and slag involved in this case belong to and are the property of Martin, Trustee of the Copper Company, and, constitute assets of the Copper Company.

This conclusion is supported by a long line of decisions and by the great weight of authority.

In re Muncie Pulp Company, CCA, 139 Fed. 546. Affirmed by the Supreme Court of the United States May 21, 1906, 202 U. S. 621, 50 L ed 1175. (Petition for Writ of Certiorari denied).

Day vs. Postal Tel. Co., 66 Md. 754, 7 Atl. 608.

In re Watertown Paper Co., CCA, 169 Fed 252.

In re Horgan, 97 Fed. 319.

Cole V vs. Price, 22 Wash. 18.

In re Rieger, Capner & Altmark, 157 Fed. 609. "The doctrine of corporate entity is not so sacred that a court

of equity, looking through forms to substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

Cook on Corporations, 7th Ed, Vol. 3, p 2432: "Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company."

Cook on Corporations, 7th Ed, Vol. 3, Sec. 663, p 2139: "And where a bankrupt practically owns the entire capital stock of the corporation, the Bankruptcy Court will consider the corporation as simply an agent of the partnership and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns."

Colonial Trust Co. vs. Montello Brick Works. (CCA 3rd Cir) 172 Fed. 310-313.

The Smelting Company being merely a subsidiary, instrumentality, etc., of the Copper Company, the smelting plant which the Copper Company erected and paid for out of its own funds, and all the property which the Copper Company caused to be held in the name of the Smelting Company, was really the property of the Copper Company and at all times subject to the debts of the Copper Company, and any purchase of the shares of stock of the Smelting Company in March, 1915, by

Leo Goldschmidt, as referred to by counsel for appellant would be subject not only to any debts of the Smelting Company, but also to all the debts of the Copper Company, because all the assets so held in the name of the Smelting Company really belonged to the Copper Company.

The manner in which the Copper Company transacted its business shows conclusively that it held out to the world that it owned all these properties, both mines and smelter. The business was all transacted in the name of the Copper Company. All goods and supplies for mine and smelter were purchased by the Copper Company. All wages of the employees of both mine and smelter were paid by the Copper company. The Southern Arizona Smelting Company was simply a ledger heading on the books of the Imperial Copper Company—a mere department of its business.

The Smelting Company being such subsidiary, instrumentality, etc., of the Copper Company and its property being liable for all the debts of the Copper Company, a purchaser of the shares of stock of the Smelting Company at a foreclosure sale or at any other sale would take such shares subject to all such debts.

Counsel for appellant devote considerable space in their brief to their contention that the Smelting Company was not a subsidiary of the Copper Company, but upon an examination of appellant's specification of errors relied upon, as contained in their brief it will be noted that they do not specify the ruling of the

Court in holding that the Smelting Company was a subsidiary, instrumentality, etc., of the Copper Company, as an error relied upon. As provided by Rule No. 24-1 (b) of this court. Transcript, pp 27-28).

Therefore it would seem that appellant has waived his right to have this court review such ruling of the District Court.

It also argued that because Martin filed a claim against the estate of the Smelting Company that it is thereby admitted that it is not a subsidiary and insrument of the Copper Company. It is sufficient answer to this argument to say that he was simply taking care that if his contention, that the Smelting Company was a subsidiary corporation, was rejected by the courts, then the amount due by it to the Copper Company, according to the books of both would not be waived by his failure to present ~~as~~ a claim.

## CONSTRUCTION OF SMELTING CONTRACT

It is admitted that all of the ore was delivered to the Smelting Company and treated by it under and by virtue of a contract made between the Copper Company and the Smelting Company on the 14th day of August, 1906, and which appears as Exhibit "A," page 20 of the Record.

That contract, after reciting that the Copper Company was a producer of ores and the owner of a smelter site and that the Smelting Company desired to purchase the smelter site and desired to obtain a contract for the ores of the Copper Company in order to have

a basis upon which to operate the smelter for outside custom ores, provides that the Copper Company shall erect a smelting plant, with all necessary machinery and appliances for the smelting and reduction of ores carrying values in copper and other metals, such plant when completed, to have a capacity of approximately 300 tons daily, and to be complete in all particulars, and erection and construction of such plant and all appurtenances and appliances thereto to be carried on under the supervision of the Smelting Company's general manager or engineer, and that upon the completion of such plant the Copper Company agrees to **sell, convey and transfer by deeds, bills of sale and other instruments of conveyance and transfer,** all of said tract of six hundred and forty acres, constituting the smelter site and townsite, together with all buildings, plant and machinery upon said land and constituting such smelter plant; **and agrees to furnish** the Smelter Company with all ores of every kind produced from the mines of the Copper Company **that may be desired by the Smelting Company, to be smelted and reduced by the Smelting Company.** The term of such contract to be for a term of six months from and after the beginning of operations of said smelter.

The smelting, reduction and marketing of such ores so delivered by the Copper Company to the Smelting Company to be done at the actual cost thereof, plus five per cent interest on the cost of the property and plant of the Smelting Company.

In consideration of these agreements by the Copper Company the Smelting Company agreed to issue and deliver to the Copper Company 7995 shares of the stock of the Smelting Company of the par value of $100 each, the same to be fully paid.

"And the Smelting Company further agrees **to take and reduce** the ores so to be furnished by the Copper Company upon the terms and at the **prices for smelting** hereinbefore set forth."

It is illuminating to read the language in regard to the transfer of the land and plant to the Smelting Company contained in this contract immediately preceding the clause in regard to the smelting of the ore, and compare the words used there with the words used with reference to the ore.

So far as the plant is concerned the contract agrees **to sell, convey and transfer by deeds, bills of sale and other instruments of conveyance and transfer.** The agreement in regard to the ore is **"and agrees to furnish the Smelting Company with all ores of every kind produced from the mines of the Copper Company, that may be desired by the Smelting Company, to be smelted and reduced by the Smelting Company."**

The object of the contract is thus stated in plain terms —to have the ore produced by the Copper Company smelted and reduced by the Smelting Company. There is no word which can be construed into an agreement to sell the ore; no price is fixed, no amount is agreed upon; no character of ore is described as that which the

Smelting Company may desire.

The contract next provides that the smelting, reduction and marketing of such ores so delivered by the Copper Company to be done by the Smelting Company at the actual cost thereof plus five per cent interest on the cost of the property and plant of the Smelting Company. This clause of the contract is clearly the consideration moving from the Copper Company to the Smelting Company and is to be in full payment and satisfaction of all of the smelting, reduction and marketing of the ores.

It would be a remarkable contract of sale which compelled the Smelting Company to take all the product of the mining company; which fixed no quantity to be received; no time of delivery, no place of delivery, and contained no words with reference to the ore which even smack of a transfer of title. The contract laboriously provides that the ore shall be delivered for the purpose of smelting and reduction and such purpose is absolutely hostile to any idea of sale.

And, the Smelting Company is only bound to take such ores from the Copper Company as it may desire. It would seem too clear for argument that if a sale by the Copper Company was contemplated, and a purchase of the ore was effected by the Smelting Company, the contract must have contained some basis upon which its liability to the Copper Company might have been ascertained. The contract contains none. Upon the other hand it contains a full and complete standard by which the value of the services

to be rendered by the Smelting Company to the Copper Company are to be fixed.

Under this contract the ore received by the Smelting Company was to be received for the purpose of being smelted and reduced by the Smelting Company. For whose benefit? Manifestly not its own, for the contract provides that the smelting, marketing and reduction of such ores shall be done by the Smelting Company at the actual cost thereof plus five per cent, to be paid by the Copper Company. If the Copper Company had sold its ore and the Smelting Company had purchased it, why such a provision in the contract? It would be meaningless and without any proper place in such a contract. It will be noted that the smelting, reduction and marketing of such ores so delivered by the Copper Company is to be done by the Smelting Company, and it would seem to follow inevitably that it was to be done by the Smelting Company as the agent and for the benefit of the Copper Company, for that company agreed to pay the actual cost of such servcies and five per cent. It is thus clearly shown that the Copper Company paying the costs of smelting, all materials used by the Smelting Company, no matter from what source they came into its possession, were a part of the costs of smelting the ore. The coke and the flux, being necessarily a part of the process of smelting were necessarily a part of the cost of smelting, and this the Copper Company agreed to pay.

What was the Copper Company to receive under this

contract for its ore? It was to receive the total product of the ore, and, as it had paid the costs of all the ingredients that went into the smelting it was entitled to the flue dust and slag.

The contract thus provides for services by the Smelting Company to be rendered to and compensated for by the Copper Company. It fixes the measure of such compensation clearly. It contains no word of transfer and no declaration that it either sells or agrees to sell any of its ore to the Smelting Company, and the Smelting Company nowhere agrees to buy any ore from the Copper Company; it only agrees to take such ore as it may desire, to be smelted and reduced.

It is elementary law that the intention of the parties is to be gathered from the entire contract, and that where the contract is plain there is no room for construction and the court must enforce the contract as it finds it.

It is earnestly insisted that the contract of December 16, 1907, set out on page 25 of the record, which is a contract between the Smelting Company, the American Metals Company, and the Imperial Copper Company, should be construed in connection with the contract of August 14, 1906, and that together they show an intent to make a sale of its property by the Copper Company. It is material to remember that the contract of August 14, 1906, bound the Smelting Company to market as well as to smelt and reduce the ores. Briefly stated, this latter contract provides for the sale and delivery of all

the copper bullion produced by the Smelting Company to the American Metals Company, at certain prices. The only part which the Copper Company took in this contract was to guarantee its performance by the Smelting Company. Nowhere did it agree to sell its property or transfer the title of its property.

There is much learned discussion of what constituted a bailment and what a sale, and many authorities are cited. It does not require argument or the citation of authority to establish the proposition that property delivered to an agent for a specific purpose, remains the property of the principal until the agent has complied with the contract under which it was delivered. The mere fact that he is authorized to sell the property does not convert him from a bailee into a purchaser, and does not convey any title to him. He receives the proceeds as he receives the property, simply and solely as agent of his principal and for his sole and exclusive use and benefit. He has a lien upon the property or the proceeds for the compensation agreed to be paid him for his services as agent, but that is his only interest in the property, and conveys no title to him.

Counsel for appellant lay much stress upon the case of the Laflin and Rand Powder Company vs. Burkhardt, 97 U. S. 110-120, 24 L ed 973-77, and they stop their citations from the case with the citation of the general principles of a bailment contained on page 110 of the report.

The court in that case, applying the principles there

laid down, said that the case then at bar was quite different from a single mechanical transaction of turning a specific set of logs into boards, or a specific lot of wheat into flour, where there is no room for judgment or discretion.

Discussing the facts of that case, the court said: "No one could lawfully use Dittmar's process for the manufacture of the article of "dualin," except himself. No one could lawfully sell it when manufactured except himself. It was lawful for him to mix these materials and to produce the compound, but it was not lawful for the Powder Company to do so. It is, then, at least a fair argument to say that when materials were sent and delivered to him, to use in a manner which he only was authorized to use, and to produce a result which he alone was authorized to produce, that both the process and the materials, when there was no stipulation to the contrary, should be taken to be his."

The smelting here provided for is a simple mechanical process which any other smelter was authorized to perform and the product of which any smelter was authorized to sell, if its contract gave it such authority. The case is utterly different from the case at bar, and is an authority for the proposition that in the absence of some agreed price for the article alleged to have been sold there could be no sale.

The case of Union Stock-Yards Co. et. al., vs. Western Land and Cattle Co., Ltd., 59 Fed. 49, is an authority

which it appears to us entirely supports the claim that this was a bailment.

The court used this language: "The cause must therefore be determined by the construction to be placed upon the contracts under which possession of the cattle was delivered to Hall. In the solution of that question, we must search for the intention of the parties, as it may be gathered from a reading of the entire instrument, and not from any separate provision of it—the real design of the contracting parties, as disclosed by the whole contract. We should not regard any mere formula of words, nor permit parties to avoid the statute by any cloaking of intent.....The true intent and meaning of the contract does not depend upon 'any name which the parties may have given to the instrument, and not alone on any particular provisions it contains, disconnected from all others, but on the ruling intentions of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.' Heryford vs. Davis, 102 U. S. 235, 243 .....In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, **to pay the purchase price.** In a bailment, if a bailment for hire, there must be payment for the use of the thing let or bailed. Heryford vs. Davis, supra. **If service is to be rendered the subject-matter of the bailment,** there must be compensation for

the service, unless the bailment be a mandate." (The bold-face is ours).

The contract under discussion here, containing no promise by the Smelting Company to take the ore at any price and no requirement that it should take all the ore produced by the Copper Company, and the further provision of the contract compensating the Smelting Company for services rendered the subject-matter of the bailment, which is the only agreement for payment by any person, would seem inevitably to stamp the contract as one of bailment and not of sale.

The Case of Chisholm vs. Eagle Ore Sampling, 144 Fed. 670, which the appellants say strongly resembles the case at bar, had this distinguishing feature of difference. The contract involved in that case contained a provision that the settlements for ore shipped should be based upon the ore sampling company's weights and samples, and that the treatment charges for reduction should be regulated by an agreed schedule. There is no doubt in that case that the Smelting Company agreed to take and pay for the ore, basing the price to be paid upon the ascertainment of its contents, and agreed that its charges for reduction should be according to an agreed schedule. The checks received for the ore expressly stated on their face that they were in payment for the ore indicated thereon.

In the present case the property was delivered to the Smelting Company to sell for the benefit of the Copper Company. No price was agreed which the Smelting

Company should pay to the Copper Company for the ore. The course of dealings under these contracts show, it seems to us, beyond question, that the Copper Company was dealing with an instrumentality created by it for the purpose of smelting its ores—simply and solely for that purpose. It agreed that the Smelting Company might sell the ores. The undisputed facts are that upon a shipment of bullion by the Smelting Company the bill of lading was attached to a draft drawn in favor of the Copper Company and turned over to it, and that the proceeds of these drafts were all received by the Copper Company. The Copper Company likewise paid all the expenses of every character of the Smelting Company. The Smelting Company never had any financial life blood. It has been found by the court in this case to be a subsidiary company, created by the Copper Company for its own purposes. Such being the case it would seem futile to argue that it would transfer to an instrumentality created by itself the legal title to its property or give it any chaaracter of possession of its assets other than that necessary to carry out the business for which it was created, to-wit, the smelting and reduction of its ores. The Smelting Company, being without any money of its own, turned over the draft for the product of the ore to the Copper Company, and is nowhere shown to have claimed any other or greater compensation than the cost of smelting plus five per cent, agreed upon by its contract. This five per cent belonged to the Copper Company and it would have been a futile operation to take it from one pocket and pay it to the

Smelting Company and immediately return it to itself as dividends, for, having paid all of the expenses and being the sole owner of all of its stock it was absolutely entitled to all of its assets over and above its expenses of operation.

Again let us consider this contract in the light of what the Copper Company was to give and what it was to receive, and what the Smelting Company was to do and what it was to receive for doing it. The Copper Company was to furnish its ores for the purpose of smelting and reduction. The contract is silent as to where the title of the product was to be, but it must ineviably follow that where property is delivered by a principal to an agent to have certain services rendered to the property and an agreed price is fixed for such services, the product and all of it belongs to the principal who furnished the ore. It is admitted that the Smelting Company has received the cost of smelting and the dividends. There is no provision in the contract that it shall receive all the byproducts of the smelting process or that its compensation shall be increased in any mode beyond the amount fixed by the contract, to-wit, cost and five per cent. To give to this contract the construction placed upon it by appellants would be to read into it a provision that it does not contain, that all of the byproducts of the process of smelting and refining shall be the property of the Smelting Company and its compensation for the services thus rendered the Copper Company be increased by that amount. There can be no doubt that the amount fixed for the services of the

Smelting Company was the only compensation contemplated by the parties, or that the Smelting Company having received that compensation in full, acquired no title to the bullion or to any product arising in the course of smelting and reducing or in any wise. There is no element of a sale in this contract and the mere fact that the Copper Company agreed to guarantee the Smelting Company's performance of its contract with the Metals Company can in no fair sense be held to be a transfer of the title of its property held by the Smelting Company as its agent and for its benefit. The construction of these contracts which holds that the ore and its products remained the property of the Copper Company, and that by its agreement to guarantee the contract of the Smelting Company with the American Metals Company, the Copper Company only agreed to guarantee its action in compliance with its contract as agent and for the benefit of the Copper Company, would seem to meet the full requirements of the law. Each would receive what was its own. Each would receive the compensation fixed by the contract. It needs no citation of authorities to show that mere isolated way bills or statements of account cannot vary the terms of the written contract and are only circumstances which tend to throw light on an obscure contract. They do not authorize either its modification or the addition of new terms to the contract.

In conclusion we say that the contract in question is a contract of bailment, for the reason that it nowhere provides for a sale, nowhere mentions any transfer of title,

nowhere furnishes any standard by which the ore is to be paid for or the amount which is to be delivered under the contract, and gives to the Copper Company no right to compel the Smelting Company to take any ore which it does not desire; that the delivery is shown to be for a certain specific purpose; that a single service was to be rendered to the subject matter of the contract, to-wit, the ore, by the Smelting Company; and that in full payment for all of its services under the contract the Smelting Company was to receive costs and five per cent. It thus clearly shows a bailment with an agreement for the treatment of the ore at a certain price for that treatment together with its marketing. There is no pretense that the Smelting Company rendered any other services under the contract as to the smelting, reduction and marketing of the ores, and there is no denial that it has received the full compensation fixed by its contract for these services. Under these circumstances it would seem difficult to show a change of title in the property or a sale to the Smelting Company.

The following authorities are cited in support of this argument:

Pattrick vs. Colo. Smelter (Colo), 38 Pac. 236: "A contract to deliver a certain quantity of sulphide ores to a smelting company for treatment and to be reduced to a marketable condition for the benefit of the owner of the ores, after compensating the smelting company for labor and expenses of smelting, is not a contract for the sale of ores."

In this case the owners of the mine made and entered into a contract with the Smelting Company wherein and whereby the said owners of the mine did contract to sell and deliver to the Smelting Company 12,000 tons of sulphide ore, the product of a certain mine, and wherein and whereby the Smelting Company agreed to receive said ores and smelt the same and to pay the owners thereof as follows: for the lead on the basis of 25 cents per unit when above 4c in N. Y., and under 4.25, and add or deduct 5c per unit for each advance or fall of ¼c in New York. No pay for lead if 10 per cent or under. Silver, 90 per cent of New York quotation. Smelting charges, $21.50 per ton. Zinc standard, 12 per cent; charge 50c per unit for each per cent above 12 per cent. This was the substance of the contract but the Supreme Court of Colorado held that it was not a contract of sale.

Cyc, Vol. 35, p 30: "Where articles are delivered by one person to another who is to perform labor upon them or manufacture them into other articles for the former, the transaction is a bailment, notwithstanding the articles are to be returned in an altered form."

Cyc, Vol. 25, p. 29: "It depends upon the substance of the agreement, but not upon its form or upon particular expressions used, whether a transaction is a bailment or a sale."

Eaton vs. Lynde, 15 Mass, 242: This was a case where A delivered yarn to B who was to procure it to be made into a cloth for a commission. B delivered

it to C to weave it at an agreed price. It was held that the general property remained in A.

Mitchell vs. Stetson, 61 Mass. 435: Quoting from the opinion: "The cases are numerous in the books in which it has been held that materials delivered to a person for the purpose of being manufactured still continue the property of the original owner, although their nature and character may be essentially changed by the process and their value largely increased. In such cases there is no contract of sale and no act done which divests the property of the original owner. It is merely a contract between principal and agent or employer and employee, the former having the title to the property and the latter a claim for compensation for his services. The manner in which this compensation is to be paid, whether by a right to sell on the part of the agent and to deduct it from the proceeds or by direct payment of it by the principal, is quite immaterial. In either case the title to the property remains unchanged and still continues in the original owner. Were it otherwise it would be difficult to carry on the common transactions of business without an endless confusion in the rights of property."

Foster vs. Pettibone, 7 N. Y. 433, 57 Am. Dec. 530: A contract by which a merchant agrees to deliver to a miller wheat to be ground and the miller agrees to return a specific proportion of flour for such wheat, is a bailment and not a sale and the wheat and also the flour when ground are the property of the merchant.

Quoting from the opinion: "We will examine the contract in detail. In October, 1844, Pettibone agreed to deliver to Foster, at Rochester, 306 bushels of wheat to be ground. These words, unless qualified and controlled by some subsequent provision of the agreement show a bailment for manufacture and not a sale. They show what was to be done with the wheat. If the contract operated as a sale Foster might lawfully sell it again and immediately. But it was to be ground and not sold and the words used by the parties control the power of Foster over the wheat and prevent him from selling it as his own property."

Inglebright vs. Hammond, 19 Ohio 337, 53 Am. Dec. 430: Where one carries wheat to a mill to be ground into flour the contract is not a sale but the property in the flour is in the one depositing the wheat, although it it with his knowledge mingled with wheat belonging to the miller.

Quoting from the opinion: "There was one proposition embraced in this suit which we think was erroneous and that was that if Hammond was to receive flour for the wheat, unless such flour was to be made out of the specific wheat delivered, the jury should consider it a sale of wheat and not a bailment."

Slaughter vs. Green, (Va) 10 Am. Dec. 488: Wheat was delivered to a miller upon an agreement that he should return a given quantity of flour for so many bushels of wheat. It was held that the miller was liable as bailee and was not a purchaser and therefore, if the

wheat be destroyed by accidental fire he will not be held responsible, and this notwithstanding the miller is not bound to return flour made from the identical wheat, but flour of a certain quality.

Quoting from the opinion: "By the terms of this agreement this wheat is to be ground into flour, and when so ground is to be returned to the farmers collectively taken. These circumstances completely negative the idea of a sale or exchange of the wheat, which would carry with it the transmutation of property. The property in the wheat is certainly not conveyed to the millers, when they could not sell the wheat in specie, without violating their contract, which is to grind it into flour; nor even to sell the flour itself without in like manner violating their agreement to return it to the several bailors. The millers in this case have the absolute ownership of nothing, but the excess of the flour which may remain to them after returning the stipulated quantity to the several farmers. This constitutes their profit in the contract, and over this portion of the subject alone have they the absolute right of property. **That right as to the residue, remains in the farmers and has never been surrendered by them.**"

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## STATUTE OF LIMITATIONS

Counsel for appellant also argue in their brief that the claim of Martin, Trustee of the Copper Company, to the flue dust and slag is barred by the statute of limitations of Arizona.

Appellant does not, in his assignments of error, assign as error the action or ruling of the District Court in overruling or not sustaining his plea of the statute of limitations. (Transcript, p 98-101).

Rule No. 11 of this Court provides that the assignment of errors shall set out separately and particularly each error asserted and intended to be urged; and that errors not assigned according to this rule will be disregarded.

Counsel for appellant do not in their specifications of errors relied upon in their brief, specify the action or ruling of the lower court with reference to the statute of limitations, as one of the errors relied on. Therefore it follows that appellant has waived his plea of the statute of limitations.

However, we most earnestly insist that there is absolutely no merit whatever in such plea.

The appellant in this case, M. P. Freeman, was the Trustee in Bankruptcy of the Imperial Copper Company from August 12, 1911, until June 17, 1914. (Transcript, pp 74-75).

On July 10, 1912, creditors of the Copper Company, bankrupt, made written demand upon Freeman, as such Trustee, to take possession of the property. (Transcript, p 78).

On September 11, 1911, the property was appraised by the appraisers of the Imperial Copper Company and taken into account as a part of the assets of the Copper Company, bankrupt. (Transcript, p 78).

For these reasons we think the decree of the court below should be affirmed. All of which is

Respectfully submitted,

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